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The Availability of the Attorney-Client and Work-Product Privileges in Shareholder Litigation

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ARTICLES

THE AVAILABILITY OF THE ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES IN SHAREHOLDER LITIGATION

DONALD B. LEWIS*

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In *Garner v. Wolfinbarger*,¹ the United States Court of Appeals for the Fifth Circuit broke important ground in the law of the attorney-client privilege. The court held that in securities litigation in which the officers and directors of a corporation are charged with having acted inimically to shareholder interests, a plaintiff is entitled to show "good cause" why the privilege should not be invoked by the corporation to preclude discovery

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¹ 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

of relevant evidence.² This decision has been applauded and followed by most federal courts.³ Indeed, the Fifth Circuit has recently made clear the wide applicability of *Garner* principles to all forms of shareholder litigation, derivative⁴ and non-derivative alike.⁵

At the same time, the efficacy of such principles has been substantially undercut by unwarranted glosses placed upon *Garner* by a handful of district courts.⁶ Efforts by defendants to swallow up *Garner* principles by labeling relevant communications "work product" have been encouraged by broad dicta in several decisions suggesting that *Garner* principles are inapplicable to such "work product."⁷

This article will explore the antecedents and progeny of the *Garner* decision. It will demonstrate the analytical errors which have threatened to undermine the salutary purposes of the *Garner* doctrine, suggest the proper framework for resolution of the *Garner* questions recurring in shareholder litigation, and review legal authority which may provide access to relevant attorney-client communications that remain unavailable after simple application of the *Garner* doctrine.

I. GARNER AND ITS ANTECEDENTS

Prior to the Fifth Circuit's decision in *Garner*, the few cases relating to the availability of the attorney-client privilege in shareholder litigation had involved extreme positions and had reached opposite results. In *Graham v. Allis-Chalmers Manufacturing Co.*,⁸ a derivative action charging the directors of Allis-Chalmers with having had prior knowledge of anti-

² *Id.* at 1103-04.

³ See, e.g., *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480 (E.D. Pa. 1978); *In re TransOcean Tender Offer Sec. Litig.*, 78 F.R.D. 692 (N.D. Ill. 1978); *George v. LeBlanc*, 78 F.R.D. 281 (N.D. Tex. 1977); *Broad v. Rockwell Int'l Corp.*, 1977 Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex.); *Valente v. Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975).

⁴ A derivative action is a suit by a shareholder who assumes the corporate mantle to enforce a corporate cause of action against a third party. The corporation is a necessary party, and the relief granted is a judgment against the third party and in favor of the corporation. See *Price v. Gurney*, 324 U.S. 100, 105 (1945); see also FED. R. CIV. P. 23.1 (procedures governing the derivative suit).

⁵ See *In re International Systems & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 n.1 (5th Cir. 1982). A case holding that *Garner* applies to all shareholder litigation, with "the nature of the suit . . . [being] of no consequence," is *Evmar Oil Corp. v. Shell Oil Co.*, No. 76-4039, slip op. at 1 (C.D. Cal. Jan. 31, 1978).

⁶ See *infra* text accompanying notes 64-103.

⁷ See *infra* text accompanying notes 99-103. The work-product doctrine, which involves not a recognized "privilege" but rather an immunity from discovery, precludes discovery of documents and tangible things which were prepared "in anticipation of litigation or for trial" by or for another party or his representative, except upon a showing that the discovery party has substantial need for the discovery and is unable to obtain the substantial equivalent by other means. FED. R. CIV. P. 26(b)(3). The doctrine had its genesis in the oft-cited case of *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁸ 41 Del. Ch. 78, 188 A.2d 125 (1963).

trust violations to which the corporation and several corporate officers subsequently pleaded guilty, the Supreme Court of Delaware refused discovery of attorney-client documents which would clearly have been relevant to the defendants' knowledge of such violations.⁹ The court in so doing rejected the plaintiff's position that the attorney-client privilege should never be available to a corporation in shareholder litigation but apparently did not consider whether the plaintiff's broad assertion could be qualified.¹⁰

On the other hand, the absolutist position that the privilege was not available against stockholder-plaintiffs was accepted by the lower court in *Garner* itself.¹¹ Moreover, prior to the appellate decision in *Garner*, the district court's ruling had been followed in three cases within the Fifth Circuit.¹² The seminal lower court decision in *Garner* and its early progeny polarized the issue of privilege in shareholder litigation.¹³

Garner presented a simple fact situation. Stockholders of First American Life Insurance Company of Alabama (FAL) had brought a class action suit alleging numerous violations of the federal securities law in connection with the sale of FAL stock. Plaintiffs sought to depose one Schweitzer, who had served as attorney for the corporation in connection with the issuance of the stock. Some of plaintiffs' proposed questions probed the substance of discussions at meetings attended by Schweitzer and corporate officials, and sought information furnished to Schweitzer by the corporation. Defendants opposed not only the questioning of the attorney on those subjects but also objected to a subpoena seeking the production of related documents.¹⁴

The court in *Garner* placed the privilege questions "in perspective" by noting the "fundamental principle that the public has the right to every man's evidence, and [that] exemptions from the general duty to give tes-

⁹ *Id.* at 89, 188 A.2d at 132.

¹⁰ Oddly enough, despite the flood of corporate litigation which has confronted the Delaware courts since *Graham*, none has seriously addressed *Garner* questions. The only case known specifically to have discussed and applied *Garner* is *Tabas v. Bowden*, No. 6619 (Del. Ch. Jan. 14, 1982), in which the Court of Chancery appeared to find *Garner* principles consistent with and a part of the law of Delaware. However, the court declined to apply *Garner* to order the production of certain opinions of counsel respecting investment practices of the corporation in a case in which, *inter alia*, 1) there were no allegations of fraud or misrepresentation; 2) the documents in question, in the court's view, related to "prospective" conduct; 3) the number of shares represented by plaintiff was unknown; and 4) the court believed plaintiff was capable of developing her own interpretations of the legality of the corporation's investment practices.

¹¹ 280 F. Supp. 1018 (N.D. Ala. 1968), *vacated*, 430 F.2d 1093 (5th Cir. 1970).

¹² *Dahlke v. Morrison*, 1969 Fed. Sec. L. Rep. (CCH) ¶ 92,490 (N.D. Ala.); *Fischer v. Wolfenbarger*, Nos. 5911 & 5919 (M.D. Tenn. Aug. 29, 1969); *Fischer v. Wolfenbarger*, 45 F.R.D. 510 (W.D. Ky. 1968).

¹³ *E.g.*, Comment, *The Attorney-Client Privilege in Shareholders' Suits*, 69 COLUM. L. REV. 309 (1969).

¹⁴ 430 F.2d at 1095-96.

timony that one is capable of giving are distinctly exceptional.”¹⁵ It reviewed certain conditions described by Professor Wigmore as “prerequisite to the establishment of a privilege,” namely that: 1) the parties communicate with the expectation that their confidences will not be disclosed; 2) the element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties; 3) the relation be one that in the community opinion should be “sedulously fostered”; and 4) the injury that would inure to the attorney-client relationship by disclosure of the communications be greater than the benefit of disclosure.¹⁶ The court found that *Garner*, involving a corporate defendant acting wholly or partly in the interests of others, countered by a demand by “those others, or some of them,” for access to the communications, raised the balancing issue of Wigmore’s fourth condition.¹⁷

The Fifth Circuit rejected the absolute positions of predecessor courts and held that in litigation charging the officers and directors of a corporation with action adverse to shareholder interests, a shareholder-plaintiff was entitled to the opportunity to show “good cause” why the privilege should not be invoked to conceal relevant evidence of an alleged fraud or other corporate misconduct.¹⁸ In so holding, the court found support in English cases¹⁹ which had treated the relationship between shareholders and a corporation analogously to the fiduciary relationship between a beneficiary and a trustee. Other precedent was found in *Pattie Lea, Inc. v. District Court*,²⁰ where the Supreme Court of Colorado had held that the statutory privilege for communications between a certified public accountant and his client did not bar disclosure of those communications in a good-faith derivative suit.

The *Garner* court then articulated a now-famous nine-point list of factors that would bear upon whether “good cause” had been shown for discovery of attorney-client communications in a particular case, citing

the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders’ claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders’ claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful

¹⁵ 430 F.2d at 1100 (citing 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. 1961)).

¹⁶ J. WIGMORE, EVIDENCE § 2285, at 527.

¹⁷ 430 F.2d at 1101.

¹⁸ *Id.* at 1103-04.

¹⁹ *Gouraud v. Edison Gower Bell Tel. Co.*, 57 L.T. Ch. 498, 59 L.T. 813 (1888); *W. Dennis & Sons, Ltd. v. West Norfolk Farmers’ Manure & Chem. Coop. Co.*, 2 All E.R. 94, 112 L.J. Ch. 239, 169 L.T. 74, 59 TLR 298, 87 Sol. Jo. 211 (1943).

²⁰ 161 Colo. 493, 423 P.2d 27 (1967) (en banc).

legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.²¹

The court's decision made it clear that the foregoing itemization was a list of "indicia that may contribute to a decision of presence or absence of good cause,"²² that it was not exhaustive, and that no single factor or combination of factors was dispositive. The court also indicated the view that its holding was "neither new nor worldshaking."²³ It further stated that the decision applied in both class action securities litigation and derivative litigation, and explained in a footnote that its decision did not turn on whether a derivative claim was "in the case or out."²⁴

The analytic foundation upon which *Garner* rests is that the attorney-client privilege does not belong exclusively to the managers of a corporation, but also belongs to its shareholders. The Fifth Circuit eloquently noted that "[c]onceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. They serve only to obscure the fact that management has duties which run to the benefit ultimately of the stockholders."²⁵ Justifying its reasoning that the availability of the corporate privilege was subject to nullification upon a proper showing of good cause by a shareholder, the court observed:

The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding the information enjoy the status of stockholders. *But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.*²⁶

In support of that proposition, the Fifth Circuit noted that communications made by a client to his attorney during or before the commission of a crime or fraud have never been held privileged, and pointed out that the *Garner* stockholders claimed to be the victims of analogous improper-

²¹ 430 F.2d at 1104.

²² *Id.*

²³ *Id.* at n.21.

²⁴ *Id.* at 1097 n.11.

²⁵ *Id.* at 1101.

²⁶ *Id.* at 1103 (footnote omitted) (emphasis supplied).

eties in connection with the issuance and sale of stock.²⁷ Moreover, the court noted that where "the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege in a subsequent controversy with the other."²⁸ It likened litigation between a corporation and its shareholders to litigation between parties that once had had common interests.

In an amicus curiae brief, the American Bar Association contended that the unavailability of the privileges might harm both shareholder and corporation.²⁹ The *Garner* court gave that argument short shrift, specifically noting that to "guarantee . . . a veil of secrecy" for an attorney's advice could "encourage [a client] to disregard with impunity the advice sought."³⁰

II. GARNER'S PROGENY

Although there has been some variation in application of the principles and criteria of *Garner*, the rationale underlying the decision seems never to have been rejected or questioned by *any* subsequent federal court. Rather, in the numerous post-*Garner* cases in wide-ranging jurisdictions, *Garner's* reasoning has been commended, adopted, and found dispositive, both in derivative and class action litigation. Nonetheless, it must be observed that there are significant differences between *Garner's* early progeny and its more recent offspring.

A. *Early Progeny*

In the first reported post-*Garner* decision, *Bailey v. Meister Brau, Inc.*,³¹ the former chief operating officer and director of the Black Company (Black) alleged that Meister Brau, the Black family, and the executors of the Black estate had conspired to breach his contract right to purchase the company. Plaintiff sought to depose defendant Cappadocia, a Meister Brau senior vice president. Cappadocia had been installed as president and chairman of the board of directors of Black on May 16, 1969, less than a month before Meister Brau purchased Black. He refused to answer questions as to his conversations between May 16 and June 6, 1969 with Meister Brau's counsel, on the grounds that he had been serving as an officer of Meister Brau at the time.³² Rejecting the contention that Cappadocia had worn a "Meister Brau hat" exclusively during the discussions, the court held that Cappadocia had been under a continuing fiduciary obligation to plaintiff—a Black shareholder—during the period,

²⁷ *Id.* at 1102.

²⁸ *Id.* at 1103.

²⁹ The ABA brief supported the view of an absolute privilege. *Id.* at 1097.

³⁰ *Id.* at 1102.

³¹ 55 F.R.D. 211 (N.D. Ill. 1972).

³² *Id.* at 212.

and that Black Company shareholders had a cognizable interest in his legal communications concerning the future of their company.³³ In so ruling, the court relied upon *Garner* and *Gourand v. Edison Gower Bell Telephone Co.*³⁴ and noted that “[t]he important consideration” in *Garner* was “that management’s duties gave the shareholders a sufficient interest in knowing its legal communications to outweigh those interests served by confidentiality.”³⁵

While the *Bailey* court recognized that *Garner* involved a different fact situation, one in which the communications were with counsel for the corporation in which the plaintiffs were shareholders, it found *Garner* principles applicable. In fact, the court concluded that the interest in disclosure was even “stronger when an executive’s communications have been with counsel for a party whose interests are potentially adverse to those of the executive’s shareholders.”³⁶

Three years passed before the federal courts had another opportunity to apply *Garner*. The opportunity came in *Valente v. Pepsico, Inc.*,³⁷ a class action proceeding brought by the minority shareholders of Wilson Sporting Goods Company (Wilson). The suit alleged that misrepresentations had been made by defendant Pepsico, Inc. in connection with a merger of Wilson into Pepsico and that the terms of the merger were unfair.³⁸ At the time of the operative events, the general counsel of Pepsico had sat on Wilson’s board of directors and Pepsico had possessed a controlling interest in Wilson. Documents sought by plaintiff related to efforts by Pepsico to determine the consequences of various forms of merger of the two corporations.³⁹ The court found these communications relevant since they described information possessed by Pepsico at a time when it was under a duty to make disclosures with respect to the tender offer.⁴⁰

The court in *Valente* concluded that *Garner* stood “generally for the proposition that where a corporation seeks advice from legal counsel, and the information relates to the subject of a later suit by a minority shareholder in the corporation, the corporation is not entitled to claim the privilege as against its own shareholders, absent some special cause.”⁴¹ It granted discovery of all the disputed documents, finding some not privi-

³³ *Id.* at 214.

³⁴ See *supra* note 19 and accompanying text.

³⁵ 55 F.R.D. at 213-14.

³⁶ *Id.* at 214.

³⁷ 68 F.R.D. 361 (D. Del. 1975).

³⁸ *Id.* at 363.

³⁹ *Id.* at 364.

⁴⁰ *Id.* at 365.

⁴¹ 68 F.R.D. at 367. The court noted that there is a “duty to make disclosures of necessary information on a subject which the minority shareholders and warrant holders were entitled to consider prior to making their decision.” *Id.* at 365.

leged. With respect to the rest, the court noted that "[a] fiduciary owes the obligation to his beneficiaries to go about his duties without obscuring his reasons from the legitimate inquiries of the beneficiaries."⁴²

In reaching its decision, the *Valente* court determined that *Garner*, though relevant, was not controlling because the minority shareholders were not seeking information from their own corporation, but rather from another corporate entity which was a controlling shareholder in theirs.⁴³ The court based its discovery ruling on the fact that Pepsico was not only a fiduciary in its position as corporation, but that it also owed a fiduciary obligation to the minority shareholders in its position as majority shareholder.⁴⁴

This variation on the *Garner* theme, centering on the fiduciary duty owed by majority to minority shareholders, was continued in *In re TransOcean Tender Offer Securities Litigation*.⁴⁵ That case involved alleged securities law violations and breaches of fiduciary duty in connection with a tender offer made by Vickers Energy Corporation for the minority shares of TransOcean Oil, Inc. Applying the good-cause criteria of *Garner*, the court specifically rejected arguments that plaintiffs should be held to a high standard of relevance and that they should be allowed access only to those attorney-client documents relating directly to the tender offer and alleged breaches of fiduciary duty.⁴⁶ Instead, plaintiffs prevailed on a motion to compel the production of numerous withheld communications.⁴⁷

TransOcean is noteworthy, for although *Valente* was based on the fiduciary relationship between majority and minority shareholders, the defendant in that case also was a corporation owned by the shareholder-plaintiff. The *TransOcean* court based its decision solely on the majority-minority shareholder relationship.

*Broad v. Rockwell International Corp.*⁴⁸ was factually similar to *Garner* in that the parties were a corporation and its shareholder-beneficiaries. Plaintiffs asserted securities law violations and presented no derivative claims. The court described *Garner* as having "reasoned that the

⁴² *Id.* at 370. The court reasoned:

The attorneys whose opinions were written to Pepsico could not avoid Pepsico's own obligations as a fiduciary. Where the fiduciary has conflicting interests of its own, to allow the attorney-client privilege to block access to the information . . . to the persons to whom the obligation is owed would allow the perpetuation of frauds.

Id. at 369.

⁴³ *Id.* at 367.

⁴⁴ *Id.* at 368.

⁴⁵ 78 F.R.D. 692 (N.D. 1978).

⁴⁶ *Id.* at 697. This same argument was rejected by the court in *Broad v. Rockwell Int'l Corp.*, 1977 Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex.).

⁴⁷ *Id.* at 697-98.

⁴⁸ 1977 Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex.).

existence of duties running from management to shareholders alters the traditional policy justifications for attorney-client privilege" and as having "concluded that disclosure cannot harm the corporation to the extent that the parties seeking disclosure are the corporation."⁴⁹ Applying *Garner*, the court ordered the production of documents to plaintiff debenture holders, to whom a fiduciary duty was owed by defendants.

*George v. LeBlanc*⁵⁰ involved an unusual application of *Garner* principles. The case was a derivative suit challenging efforts by LeBlanc to take over the operations of Great Commonwealth Life Insurance Company (GCL). Defendants sought to disqualify plaintiff's counsel on the grounds that plaintiff had obtained from a former attorney for a holding company of GCL certain documents containing "confidential" information.⁵¹ The court rejected the disqualification effort, noting that the so-called "confidential" information upon which the motion was based was available to plaintiffs because they "undoubtedly could have made the requisite good cause showing" required by *Garner*.⁵²

Despite the results in the foregoing cases, application of *Garner* principles cannot, of course, ensure that material sought by plaintiff will be deemed discoverable by the court. *In re Colocotronis Tanker Securities Litigation*⁵³ involved a series of transactions in which the European American Banking Corporation (EABC) entered into loans with the Colocotronis group of shipping companies and then established agreements whereby plaintiff banks "took participations"⁵⁴ in the loans. Several years after the loans were made, the finances of the Colocotronis group deteriorated and there ensued a series of "workout" meetings⁵⁵ attended by the participant banks. The banks eventually sued EABC and sought to discover relevant communications between EABC and its counsel.

The *Colocotronis* court recognized the vitality of *Garner*⁵⁶ and reasoned that the assertion by corporate fiduciaries of the privilege against disclosure to individuals "whom they exist to serve" was "untenable."⁵⁷ However, the court concluded that based on the peculiar facts of the case, an attorney-client relationship had never existed between plaintiffs and the attorneys whose communications they sought. Therefore, it found that no

⁴⁹ *Id.* at ¶ 91,304.

⁵⁰ 78 F.R.D. 281 (N.D. Tex.), *aff'd*, 565 F.2d 1213 (5th Cir. 1977).

⁵¹ Defendants based their claim on the ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979), stating that a lawyer must preserve the confidences and secrets of a client. 78 F.R.D. at 286. The court balanced the attorney's fiduciary duty against Canon 4. *Id.* at 290.

⁵² 78 F.R.D. at 290.

⁵³ 449 F. Supp. 828 (S.D.N.Y. 1978).

⁵⁴ *Id.* at 828.

⁵⁵ *Id.* at 829.

⁵⁶ 449 F. Supp. at 832-33.

⁵⁷ *Id.* at 833.

special fiduciary or trust relationship existed comparable to the shareholder-corporate relationship⁵⁸ and that the allegedly privileged communications at issue were not discoverable.

The high-water mark of the *Garner* doctrine was reached in 1978 and involved a securities fraud class action proceeding. The plaintiffs in *Cohen v. Uniroyal, Inc.*⁵⁹ moved for discovery of extensive information concerning Uniroyal's relationship with its counsel. In particular, plaintiffs sought legal opinions and related attorney-client communications. Conceding that complete removal of the privilege as had been ordered in *Fischer v. Wolfenbarger*⁶⁰ could lead to a destruction of candid attorney-client communications, the court nonetheless approved and adopted the good-cause test of *Garner*.⁶¹ It noted that the fact that the case involved a class of stock purchasers rather than shareholders was immaterial to a *Garner* analysis, since all the purchasers had become stockholders by purchasing stock at prices inflated as a result of alleged misrepresentations.⁶² In addition, the *Cohen* court aptly noted a seldom-observed holding of *Garner*: that where unanimity or substantial unanimity of shareholders exists, the privilege "would be immediately overcome without further inquiry into other elements of good cause."⁶³ A motion for the production of numerous attorney-client documents was consequently granted.

B. Recent Progeny

As noted, *Cohen v. Uniroyal, Inc.* represents the apogee of the *Garner* doctrine. Subsequent cases have begun to carve out exceptions to the doctrine which interfere with its therapeutic goals.

Panter v. Marshall Field & Co.,⁶⁴ an application of *Garner* principles close on the heels of *Cohen*, arose out of a tender offer by Carter Hawley Hale (CHH) for the purchase of Marshall Field & Company (Marshall Field). Plaintiffs brought a class action against Marshall Field and its directors and officers, claiming securities law violations and breaches of fiduciary duty. A variety of documents were sought relating to other proposed acquisitions predating the CHH proposal, documents relating to the CHH combination, and documents relating to shareholder litigation arising from the tender offer.

The court in *Panter* made clear that where a party asserts advice of counsel as an element of its defense, as Marshall Field did, it waives the

⁵⁸ *Id.*

⁵⁹ 80 F.R.D. 480 (E.D. Pa. 1978).

⁶⁰ See *supra* note 12 and accompanying text.

⁶¹ 80 F.R.D. at 484.

⁶² *Id.*

⁶³ 80 F.R.D. at 484 n.4 (citing 430 F.2d at 1101).

⁶⁴ 80 F.R.D. 718 (N.D. Ill. 1978).

attorney-client privilege with respect to all transactions where such advice was sought.⁶⁵ The court found additional support for discovery of documents relating to the proposed transaction, citing *Garner* and its progeny and applying *Garner* criteria.⁶⁶ In dictum, however, it found that good cause had not been established as to eight documents because they were prepared after the commencement of *Panter*, although no valid claim of attorney-client privilege attached to those documents.⁶⁷ Moreover, the court rejected claims that the work-product doctrine⁶⁸ justified the withholding of fourteen other documents, since defendants' reliance on the advice of their counsel rendered the content of the documents a central issue which overcame any claim of work-product immunity.⁶⁹

Ironically, although each document withheld in *Panter* was ordered produced, the brief dictum that documents postdating the litigation or constituting work product *might* be withheld proved to be a seedbed for the practical frustration of *Garner* principles.

In re LTV Securities Litigation,⁷⁰ was a securities fraud class action brought by buyers and sellers of the securities of LTV Inc. (LTV). The case involved allegations that the officers, directors, underwriters, and accountants of LTV had conspired to defraud LTV's shareholders by overvaluing the inventories of an LTV subsidiary through a series of complex accounting manipulations. On November 8, 1977, prior to the conclusion of the class period subsequently certified by the court and in the wake of the service of subpoenas by the Securities and Exchange Commission on LTV, the New York firm of Davis, Polk and Wardwell (Davis Polk) was retained by LTV and its independent auditor, Ernst & Whinney. Davis Polk thereafter represented LTV throughout the SEC investigation and in addition "superintended an intensive examination of LTV's files and financial procedures."⁷¹ On July 17, 1978, LTV announced that trading in its securities would be suspended due to possible adjustments of the value of its subsidiary's inventories. When suit was filed by LTV's shareholders shortly thereafter, Davis Polk's representation was expanded to include the defense of the shareholder suits.

In *LTV*, the court certified a class for a period beginning in 1974 and ending on July 17, 1978, some eight months *after* the retention of Davis Polk. The discovery sought by the class was of information generated by LTV after the SEC investigation had commenced in November 1977. As Judge Patrick Higginbotham phrased it, the requested discovery took place after LTV had "been under the protective wing of its able legal

⁶⁵ *Id.* at 721.

⁶⁶ *Id.* at 723.

⁶⁷ *Id.* at 724.

⁶⁸ See *supra* note 7.

⁶⁹ 80 F.R.D. at 725.

⁷⁰ 89 F.R.D. 595 (N.D. Tex. 1981).

⁷¹ 89 F.R.D. at 599.

hens.”⁷² The information the class sought to obtain was, inter alia: the identity of an SEC informant; the identity of key documents on which LTV had based the suspension of trading of its securities; documents explicating the nature of Davis Polk’s review; unexpurgated minutes of certain LTV board and annual committee meetings; and a report by LTV counsel on the SEC investigation.⁷³ LTV invoked the protection of both the attorney-client privilege and the work-product rule in order to withhold the information the class requested.

After concluding that the attorney-client privilege attached to the documents at issue, the court turned to the criteria of *Garner v. Wolfenbarger*. Although the LTV court recognized that pursuant to *Garner* the privilege “must yield where ‘good cause’ is shown,”⁷⁴ it nonetheless applied *Garner* restrictively and denied plaintiffs’ claims.

Initially, the LTV court noted that the communications ordered disclosed in *Garner* were those which formed the basis for management judgments subsequently challenged in the shareholder action, and that the information sought from the lawyers related to their activities before the litigation. The court distinguished the case before it, stating that the class in LTV sought “after-the-fact communications concerning offenses already completed” and that LTV “management’s remedial decision in 1978 to restate LTV’s prior earnings” was not the act of which the class complained.⁷⁵

The LTV court then noted that the *Garner* court had indicated that two indicia of “good cause” for the production of relevant communications were whether the communications “related to past or to prospective action” and whether they consisted of “advice concerning the litigation itself.”⁷⁶ Citing the decisions in *Cohen*, *Panter*, *Broad*, and *Valente*, the court peculiarly reasoned that while disclosure of “remedial advice” could injure the corporation, it would place the shareholder-plaintiffs in “no worse position than if the communications had never taken place.”⁷⁷ The court attached great significance to the fact that none of the decisions after *Garner* had subjected “post-event” attorney-client communications to disclosure.⁷⁸

The court also accepted LTV’s claim that the requested discovery was barred by the work-product doctrine. It found that once a federal agency had begun investigating LTV, there existed more than a “remote” prospect of litigation. Therefore, the work-product immunity attached to documents and other tangibles prepared for a party. The court did recognize

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 89 F.R.D. at 607.

⁷⁵ *Id.*

⁷⁶ 430 F.2d at 1104.

⁷⁷ 89 F.R.D. at 608.

⁷⁸ *Id.* at 607-08.

that pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, a party may obtain discovery of work product upon showing that he has "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."⁷⁹ However, it found that the required showing had not been made. In fact, the court demonstrated remarkable hostility to the plaintiffs, stating that the class was merely "attempting to capitalize on LTV's self-evaluation of its past financial practices rather than to evaluate those practices itself."⁸⁰ The court went so far as to state that, because all the information withheld by LTV had assertedly been produced by LTV in another form, "LTV has already furnished the pieces of the jigsaw puzzle and the class must find the alleged solution, if one exists, on its own."⁸¹

Shortly after *LTV*, a novel application of *Garner* principles occurred in a peculiar antitrust action, *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan*.⁸² Although the facts of *Ohio-Sealy* are not clear, it appears that plaintiffs competed in the bedding market with Ohio-Sealy and its licensees. Plaintiffs, however, asserted contradictory claims in the action: 1) class action antitrust claims in their capacity as competitors; and 2) a derivative suit seeking to compel the directors of Ohio-Sealy to conform with the antitrust laws, in their capacity as owners of 0.7% of the shares of Ohio-Sealy.⁸³

The requested discovery in *Ohio-Sealy* appears to have involved documents relating to an assessment by Sealy's attorneys of the legality under the antitrust laws of Sealy's system of territorial allocation. The court reversed a determination by a federal magistrate that under *Garner* plaintiffs had established "good cause" for the discovery of the documents. This decision was based on two grounds. First, the court relied on the rationale of *LTV* that the information demanded long predated the imminence of the action sub curia and was in a large measure action relating to "prospective" conduct and reflecting advice concerning the litigation at hand. Citing dictum in *Panter*, the court suggested that in prior cases in which discovery of attorney-client communications had been ordered, the information related to past conduct and did not relate to the "litigation itself."⁸⁴ Second, the court noted that plaintiffs represented

⁷⁹ See *supra* note 68.

⁸⁰ 89 F.R.D. at 613.

⁸¹ *Id.* Even in an adversarial system such as the American court system, the view that fraud litigation may be likened to assembling a "jigsaw puzzle" would appear unduly to denigrate the plaintiffs' purposes and to be antithetical to the salutary purposes of the securities laws recognized as recently as *Herman & MacLean v. Huddleston*, ____ U.S. ____, 103 S. Ct. 683 (1983).

⁸² 90 F.R.D. 21 (N.D. Ill. 1980).

⁸³ *Id.* at 25.

⁸⁴ *Id.* at 31.

fewer than one percent of Sealy's shares and found that the "unusual" posture of the litigation presented an additional reason for withholding the information.⁸⁵ It reasoned that if the documents were produced in the derivative litigation, the information in them could be utilized by plaintiffs in their class action antitrust suit to the detriment of Sealy, their competitor.⁸⁶

The last published district court decision examining *Garner* is *Donovan v. Fitzsimmons*.⁸⁷ In *Donovan*, the Secretary of Labor brought suit against a pension fund, claiming that various officials of the fund had breached their fiduciary duties to fund beneficiaries by entering into a "series of questionable investment transactions."⁸⁸ Defendants resisted production of a variety of documents on both attorney-client and work-product grounds.

The court adopted plaintiff's view that under *Garner* the officials could not assert privilege claims against the Secretary, who was in effect acting on behalf of plan beneficiaries, in a suit challenging the fund with breach of its fiduciary duties under the Employee Retirement Insurance Security Act.⁸⁹ Specifically rejecting the claim that the *Garner* doctrine represented a "radical departure from settled principles,"⁹⁰ the court declared:

To the contrary, the *Garner* approach is well-reasoned. It adequately assures the public interest in attorney-client confidentiality, yet acknowledges that disclosure must prevail in those limited

⁸⁵ *Id.*

⁸⁶ It has been suggested that *Ohio-Sealy* stands for the proposition that class action shareholder-plaintiffs stand in a different position than derivative plaintiffs with respect to *Garner*. See Kirby, *New Life for the Corporate Attorney-Client Privilege*, A.B.A. J. 174, 175-77 (1983). Not only is that argument refuted by the Fifth Circuit in *International Systems*, but it represents a thoroughly mistaken reading of *Ohio-Sealy*. In *Ohio-Sealy* the class action claims were brought under the *antitrust* laws by a *competitor* of Sealy, with the result that the grant of access to the attorney-client communications for the class plaintiff could quite reasonably have been thought antithetical to corporate interests.

⁸⁷ 90 F.R.D. 583 (N.D. Ill. 1981). Other courts have found *Garner* applicable to situations somewhat removed from conventional shareholder litigation. See, e.g., *Girard Bank v. Penn Cent. Corp.*, No. 81-1539 (E.D. Pa. Jan. 20, 1983) (officers of one entity were not permitted to hide behind work-product and attorney-client privileges in a dispute which affected another entity to which they owed an equal fiduciary duty); *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982) (attorney-client privilege not available to fiduciaries of a trust fund because the exercise of their authority is not for themselves, but for the trust's beneficiaries); *Boswell v. International Bhd. of Elec. Workers Local 164*, 106 L.R.R.M. (BNA) 2713 (D.N.J. 1981) (union officers could not assert attorney-client privilege against member with respect to advice from counsel relating to legality of their conduct toward him because of fiduciary relationship); *Estate of Torian v. Smith*, 263 Ark. 304, 564 S.W.2d 521 (1978) (executor of will was necessarily acting for both itself and beneficiaries, therefore attorney-client privilege not applicable to advice given executor by attorney).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 586.

circumstances in which beneficiaries of corporate fiduciaries show a valid need for information. As such, it is hardly surprising that the Fifth Circuit's approach has received relatively wide acceptance in shareholder actions seeking the disclosure of privileged corporate information.⁹¹

The court then addressed defendants' assertion that *Garner* was inapplicable to work-product claims. It began by noting that the work-product barrier to disclosure, unlike the attorney-client privilege, is the attorney's to assert.⁹² The court further reasoned that shareholders as beneficiaries do not stand in the same position vis-a-vis the attorneys as they do with respect to their own trustees.⁹³ It then concluded:

The problem is a tricky one, requiring a recognition of the purposes of the work-product doctrine but tempered by the interests in disclosure acknowledged by *Garner* lest the work-product immunity swallow up the *Garner* exception in its entirety. The first step in striking a proper balance is to return to the modern foundations of the privilege articulated in *Hickman v. Taylor* . . . and codified in Rule 26(b)(3). The core of the privilege is to protect against the disclosure of the private mental impressions, conclusions and opinions of the attorney. Yet neither *Hickman* nor the Federal Rules view the protection of these interests as absolute. Rather, the immunity is subject to a good cause showing. That is, a party may obtain discovery of such materials upon a showing of "substantial need of materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."⁹⁴

Finally, the court held that the presumptive application of the *Garner* exception was warranted. The work-product privilege did not bar disclosure of those documents pertaining to information provided to and relied upon by the pension fund trustees.⁹⁵ The court thereby avoided many of the analytic pitfalls into which its recent precursors had fallen.

⁹¹ *Id.* (citations omitted). The court found that the "pension fund trustee analogue" was "particularly well-suited to the rule's application." *Id.* (citing *Riggs National Bank v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976), and *Boswell v. International Bhd. of Elec. Workers Local 164*, 93 Lab. Cas. (CCH) ¶ 13,372 (D.N.J. 1981)).

⁹² 90 F.R.D. at 587.

⁹³ *Id.* at 588. The court's analysis of that point seems flawed and its pronouncement overbroad. In point of fact, the "work product" of corporate attorneys will routinely be shared with the corporate managers who in effect purchase it. In any instance in which "work product" is provided to such managers, it will, in cases such as *Panter*, be relevant to the question of corporate scienter and there would appear no reason why a shareholder would have any less claim to the production of such communications than to traditional attorney-client communications.

⁹⁴ 90 F.R.D. at 586 (citing Fed. R. Civ. P. 26(b)(3)).

⁹⁵ *Id.*

An appellate court had a rare opportunity to decide a case where a plaintiff based his claim on *Garner* in *Weil v. Investment/Indicators Research & Management*.⁹⁶ In *Weil*, the plaintiff alleged that the defendants had violated the securities laws in offering shares of an investment fund. The thrust of the suit was that the fund should have disclosed, in its prospectuses, that it had failed to register its shares under the Blue Sky Laws of most states and that failure to register subjected the fund to large contingent liabilities. The Ninth Circuit declined to certify the case as a class action and instead directed that the case proceed through discovery on an individual basis.⁹⁷

In the course of discovery, defendants invoked the attorney-client privilege in response to questions relating to advice given to the fund by counsel regarding registration of fund shares pursuant to state Blue Sky Laws. Addressing a request by plaintiff that it should follow *Garner* and order production of such communications, the court tersely stated:

Without passing on the merits of *Garner*, we find it inapposite to the case before us. Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The *Garner* plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class. *Garner's* holding and policy rationale simply do not apply here.⁹⁸

Indeed, the Ninth Circuit's decision, strictly construed and limited to the facts of *Weil*, appears both unexceptional and technically correct. There was clearly little or no basis in *Weil* for a *Garner* motion, since the defendant corporation was in litigation with only one former shareholder—not with a class consisting of a substantial number of past shareholders, or with any present shareholders. Additionally, the record suggested that no good cause had been presented for discovery of any attorney-client communications. The court had not only rejected plaintiff as a proposed class representative but it also considered plaintiff's claims to be of dubious merit since no contingent liability had yet been realized by the company as a result of its alleged failure to register its securities.

The passing remarks of the Ninth Circuit concerning *Garner* cannot reasonably be construed as holding that the mere fact that a plaintiff's suit is not a derivative one should somehow be dispositive of a plaintiff's request for discovery of attorney-client communications. There is simply no basis for reading *Weil* as a departure from a long line of established precedent or as a fundamental limitation on the applicability of the *Garner* doctrine. In fact, shortly after *Weil*, the Fifth Circuit, the procreator

⁹⁶ 647 F.2d 18 (9th Cir. 1981).

⁹⁷ *Id.* at 21.

⁹⁸ *Id.* at 23.

of *Garner*, confronted the *Garner* doctrine for the first time in thirteen years in *In re International Systems & Controls Corp. Securities Litigation*,⁹⁹ and made it clear that such limitations were totally improper.

The facts of *International Systems* bear close scrutiny. In March 1976, International Systems and Controls Corporation (ISCC) received a letter from the Securities and Exchange Commission regarding alleged bribes to foreign nationals. In an attempt to enroll in a voluntary disclosure program of the SEC, ISCC appointed an audit committee consisting of two independent directors, who retained a law firm (Watson, Ess, Marshall & Engass) and an accounting firm (Arthur Young & Company) to investigate the payments. Subsequently, derivative and class action suits were filed against ISCC by its shareholders, who moved to compel production of binders compiled by Arthur Young in its special review. The corporation opposed production of the binders on both attorney-client and work-product grounds.

After reviewing its decision in *Garner*, the *International Systems* court made clear that the rationale of *Garner* was not limited to derivative suits by present shareholders. The court indicated that the *Garner* doctrine was equally applicable to the class action plaintiff, since even if he were not presently a shareholder, "at the time in question he was, and the defendants owed him duties in their management of the corporation."¹⁰⁰ Nonetheless, the court declared that *Garner* "was not intended to apply to work product."¹⁰¹ The Fifth Circuit reasoned that "once there is sufficient anticipation of litigation to trigger the work product immunity," the mutuality of interest between shareholder and management which underlies the *Garner* doctrine is destroyed.¹⁰² The court found that discovery of the work-product materials was available under either Federal Rule 23(b)(3) and its "undue hardship" and "substantial need" tests or pursuant to the "crime-fraud exception"¹⁰³ to the work-product immunity doctrine. It remanded the case for a detailed examination of whether the Arthur Young documents were discoverable pursuant to those tests.

III. THE CURRENT VITALITY OF THE GARNER DOCTRINE

Current assessments of the vitality of the *Garner* doctrine include the fatuous suggestion that *Garner* is no longer a viable doctrine¹⁰⁴ as well as the more sober assertion that "[t]he cases construing *Garner* are few, and

⁹⁹ 693 F.2d 1235 (5th Cir. 1982).

¹⁰⁰ *Id.* at 1239 n.1.

¹⁰¹ *Id.* at 1239.

¹⁰² *Id.*

¹⁰³ In general, that exception permits the discovery of otherwise privileged communications where an attorney is consulted for advice that will assist a client in carrying out a contemplated illegal or fraudulent scheme. *Id.* at 1242; see *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977).

¹⁰⁴ See Kirby, *supra* note 86.

in substantial disagreement."¹⁰⁵ Clearly, the progeny of *Garner* postdating *Panter* require serious reflection and a re-evaluation of the meaning of *Garner*.¹⁰⁶ However, one thing is clear: despite rumors to the contrary, the *Garner* doctrine is alive and well.¹⁰⁷

It seems incredible that the argument could seriously be advanced by some litigators¹⁰⁸ that the Supreme Court's decision in *Upjohn Co. v. United States*¹⁰⁹ somehow undercuts *Garner* and the numerous decisions following it. In *Upjohn*, an audit of one of that company's foreign subsidiaries found that the subsidiary had made payments to or for the benefit of foreign government officials in order to secure government contracts.¹¹⁰ The accountant conducting the audit informed general counsel for Upjohn of the payments, and an internal investigation was initiated. One facet of the investigation involved sending questionnaires to "all foreign general and area managers" concerning any questionable payments made by Upjohn.¹¹¹ Responses were sent directly to the general counsel. The general counsel and outside counsel also interviewed the recipients of the questionnaires.

The company voluntarily submitted a report to the SEC disclaiming certain payments and also submitted a copy of the report to the IRS.¹¹² In conducting its investigation to determine the tax consequences of the payments, the IRS issued a summons demanding production of all files pertaining to Upjohn's internal investigation, including the questionnaires and memoranda or notes concerning the interviewees.¹¹³ Upjohn refused to produce the documents on both attorney-client and work-product grounds.¹¹⁴

The Sixth Circuit adopted the "control group" test in measuring the

¹⁰⁵ Walton & Meagher, *Attorney-Client Privilege in Stockholder Actions*, NAT'L L.J., Oct. 10, 1983, at 15, col. 2.

¹⁰⁶ Although the impact of the *International Systems* dictum is unclear, a recent unpublished decision in *Heist v. Jacob*, No. C-3-82-184 (S.D. Ohio Oct. 21, 1983), *decided sub. nom.* In re Dayco Corp. Derivative Sec. Litig., relied on that case to deny discovery of a report of counsel to a committee of the board of directors of Dayco. The report related to an investigation of alleged illegalities arising out of the company's recording of sales to what proved to be fictitious Soviet purchasers. While recognizing that *Garner* stated the law of the Sixth Circuit, the court concluded that the special report constituted work product, and that the substantial need/undue hardship tests of *International Systems* prevailed over the balancing test of *Garner* and had not been satisfied.

¹⁰⁷ See generally Lewis, *Garner Is Alive and Well In Securities Litigation*, 69 A.B.A. J. 903 (1983) (cited in *Heist*, slip op. at 7 n.3, for the proposition that *Garner* correctly interprets the law and should be applied in the Sixth Circuit).

¹⁰⁸ See, e.g., Kirby, *supra* note 86.

¹⁰⁹ 449 U.S. 383 (1981).

¹¹⁰ *Id.* at 386.

¹¹¹ *Id.*

¹¹² *Id.* at 387.

¹¹³ *Id.*

¹¹⁴ *Id.* at 388.

scope of the attorney-client privilege in the corporate context and remanded the case to the district court.¹¹⁵ Under this test, the privilege attaches to those communications made by members of the control group comprising a company's decision-makers.¹¹⁶

The Supreme Court, finding contrary to the court of appeals, merely stressed the value of certainty in the attorney-client privilege as it rejected the "control group" test for the privilege and precluded the Internal Revenue Service from having access to internal corporate investigative reports.¹¹⁷ The premise of the argument that *Upjohn* has nullified *Garner* is that the purpose of the attorney-client privilege cannot be served if the attorney and client are not able to predict in advance with "certainty" whether particular discussions will be protected from "outsiders," and that so long as *Garner* retains vitality there can be no certainty that the discussions of corporate managers and corporate attorneys will be protected from invasion by shareholders.¹¹⁸

Concern for predictive certainty with respect to the attorney-client privilege completely overlooks the fact that where past or present corporate shareholders—rightful possessors of the corporate privilege—seek to inquire into communications between *their* managers and *their* attorneys,

¹¹⁵ 600 F.2d 1223 (6th Cir. 1979).

¹¹⁶ *Id.* at 1227.

¹¹⁷ 449 U.S. at 392-93. See generally Gergacz, *Attorney-Client Privilege: Cases Applying Upjohn, Waiver, Crime-Fraud Exception, and Related Issues*, 38 BUS. LAW. 1653 (1983), which describes the Court's approach as objectifying the application of the privilege by looking to the presence of the following factors:

1. The communications were made by corporate employees to corporate counsel upon order of superiors in order for the corporation to secure legal advice from counsel.
2. The information needed by corporate counsel in order to formulate legal advice was not available to upper-level management.
3. The information communicated concerned matters within the scope of the employee's corporate duties.
4. The employees were aware that the reason for communication with counsel was so the corporation could obtain legal advice.
5. The communications were ordered to be kept confidential and they remained confidential.
6. The identity and resources of the opposing party.

Id. at 1653.

Despite this apparently mechanical approach, Gergacz emphasizes "that a very narrow reading of *Upjohn*" i.e., one rigidly objectifying the privilege, "is not acceptable." *Id.* at 1658. This position follows directly from *Upjohn*, as the case states "some degree of certainty is necessary," but continues, "[w]e decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so." 449 U.S. at 386.

¹¹⁸ See Kirby, *supra* note 86. For similar suggestions that considerations of predictive certainty might justify retrenchment of *Garner* principles in favor of an expanded crime-fraud exception to the privilege, see Dallas, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 S. CAL. L. REV. 303 (1977). But see Lewis, *supra* note 106 (recent court decisions have strengthened rather than eroded the *Garner* foundations).

the privilege is being neither infiltrated nor breached. Rather, shareholders are being permitted to monitor the conduct of their servants. The interests of corporations and corporate management would seem best served by an inability of corporate managers to predict confidently that they will be able to cloak litigable misconduct from the eyes of their shareholder-owners. Moreover, *Upjohn* itself stands for the proposition that a corporation, for purposes of the attorney-client privilege, is not confined to a "control group" echelon of top officers, but is to be far more broadly defined.¹¹⁹ To read *Upjohn* as narrowing the definition of a corporation to exclude from it the corporate shareholders who constitute and own the corporation would be both ironic and erroneous.

Upjohn surely did not break new ground in recognizing that attorney-client privilege, properly restricted and properly applied, may have certain social benefits.¹²⁰ That fact has long been recognized,¹²¹ as has the fact that the privilege impedes the search for the truth and therefore should apply "only where necessary."¹²² In sum, neither the reasoning nor the holding of *Upjohn* challenges the continued viability of the *Garner* doctrine.

It is in any event highly significant that *Upjohn* preceded the decisions of *LTV*, *Donovan*, and *International Systems*, and that an attack on the applicability and utility of *Garner* does not appear to have been attempted by the parties or considered by the courts in any of those cases. Those cases did not raise the certainty interests, adverted to by the Supreme Court in *Upjohn*, to the extent that they precluded even the rightful owners of a privileged communication from having access to it. Further, the court in *Wolfson v. Riley*,¹²³ when presented with similar arguments, curtly rejected them. Although the court never issued a formal opinion, it ruled from the bench that *Upjohn* did not undercut the precedential authority of *Garner*. Indeed, the judge specifically stated:

[I]t seems to me that the *Garner* case is controlling, or persuasive . . . with respect to discovery sought by shareholders in this kind of situation and that . . . I do not read [*Upjohn*] as do the defendants. That is a situation where the discovery was being sought by the IRS, not a situation where discovery was being sought by shareholders either in a shareholders' suit or in a derivative

¹¹⁹ 449 U.S. at 392.

¹²⁰ *Id.* at 392-93, 398.

¹²¹ See, e.g., *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.), cert. denied, 377 U.S. 976 (1964); see also 8 J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. 1961) (stating that the policy of the privilege is to promote the consultation of legal advisors by clients and that disclosure of confidences ought to be prohibited by law except where the client's consent has been obtained).

¹²² *Fisher v. United States*, 425 U.S. 391, 403 (1976).

¹²³ No. C79-642 (N.D. Ohio argued May 18, 1982).

suit.¹²⁴

These brief remarks succinctly summarize the fallacies in the notion that *Upjohn* has any relevance to *Garner* issues.

The viability of *Garner* is underscored by other recent developments in the law. Communications between corporate managers and corporate attorneys tend to be particularly probative on issues of scienter. In *Herman & MacLean v. Huddleston*,¹²⁵ the Supreme Court has very recently recognized that proof of scienter in securities fraud cases often requires inferences to be drawn from circumstantial evidence.¹²⁶ The Court also held that this very fact would make it unjust for defrauded investors to be required to prove their case by more than a preponderance of the evidence.¹²⁷ Placing unrealistic strictures upon shareholder-plaintiffs' access to the most probative evidence available would threaten to eviscerate federal securities statutes.

Nonetheless, while the rule of *Garner* is alive and well, it would be healthier if the cases between *Panter* and *International Systems* had not placed imprecise and, in some instances, mistaken glosses on the doctrine.

It will be recalled that, subsequent to *Panter*, withholding of relevant communications has been permitted on the following grounds:

1. that the requested information post-dated the filing of the suit;¹²⁸
2. that the requested information post-dated the acts complained of and constituted "post-event" or "remedial" advice;¹²⁹
3. that the information requested related to "prospective" actions and concerned the litigation itself;¹³⁰
4. that the requested information constituted "work product" materials.¹³¹

It seems clear that all the decisions limiting *Garner* share a common impulse: the protection of information developed by new counsel for a corporation not involved in the underlying transactions and retained by the corporation after suit by shareholders had become foreseeable. Indeed, the broad *International Systems* dictum that *Garner* did not apply to work product was explained by the Fifth Circuit on the ground that it was unreasonable to "indulge in the fiction that counsel, hired by management, is also constructively hired by the same party counsel it is expected to defend against."¹³² To be sure, the *Panter*, *Ohio-Sealy*, *LTV*, and *International Systems* formulations of limitations on *Garner* are se-

¹²⁴ Proceedings at 5, *Wolfson v. Riley*.

¹²⁵ — U.S. —, 103 S. Ct. 683 (1983).

¹²⁶ *Id.* at —, 103 S. Ct. at 686-88.

¹²⁷ *Id.* at —, 103 S. Ct. at 690-92.

¹²⁸ See *Panter*, 80 F.R.D. 718.

¹²⁹ See *LTV*, 89 F.R.D. 595.

¹³⁰ See *Ohio-Sealy*, 90 F.R.D. 21.

¹³¹ See *International Systems*, 693 F.2d 1235.

¹³² 693 F.2d at 1239.

riously flawed.

First, the “prospective action/past action” dichotomy of *Garner* has been the subject of undue confusion, with the *Ohio-Sealy* court going so far as to hold that communications involving “prospective” actions are *not* discoverable under *Garner*.¹³³ Yet it would seem clear that *Garner* intended relevant attorney-client communications with respect to prospective actions to be routinely discoverable. The content of those communications will usually be not merely relevant to, but among the best evidence of, questions of corporate scienter or good faith. Indeed, it would seem that the only relevant communications relating to prospective corporate actions *not* discoverable under *Garner* would be communications relating to those corporate activities which remain in the “sensitive planning stages.”¹³⁴ Also, the *Garner* court’s reference to “past” actions suggests that attorney-client communications relating to actions already completed might not in a given case be discoverable because they are less likely to reflect on the scienter or good faith of corporate defendants, or because they relate to the defense of the litigation itself. However, the *Garner* court cautiously stopped far short of granting liberal exemption from discovery to such communications, recognizing that in each case the test for discoverability is whether there is “good cause” for production of such communication.¹³⁵

Second, the court in *LTV* clearly erred in establishing a broad exception to *Garner* for “post-event” communications. Of the *Cohen*, *Panter*, *Broad*, and *Valente* cases—all of which were cited by the court¹³⁶—not one offers any reasonable support for recognition of such an extensive exception.

To begin with, although the opinion in *Cohen* does not make it clear, the record demonstrates that “post-event” communications were indeed ordered produced in that case. In ordering the production of the requested communications, the court observed that *all* communications related to past actions, not to matters in the “sensitive planning states.”¹³⁷ The *Cohen* construction of the “prospective action” criterion of *Garner* is totally at odds with a broad exception for “post-event” communications.¹³⁸

Additionally, the court’s dictum in *Panter* notwithstanding, all documents at issue in that case, including “post-event” communications, were ordered produced, since the defendants failed to establish that any privilege attached to them. While there is nothing in the *Broad* or *Valente* opinions to indicate that post-event communications were ordered pro-

¹³³ 90 F.R.D. at 31.

¹³⁴ 80 F.R.D. at 485.

¹³⁵ 430 F.2d at 1104.

¹³⁶ 89 F.R.D. at 599-600, 607-08.

¹³⁷ 80 F.R.D. at 485.

¹³⁸ *Id.* at 723-26.

duced, neither is there any pronouncement that attaches undue significance to the date of the communications. In fact, as noted, *Valente* placed the burden on defendants to establish that "good cause" had not been shown in a particular case.

Third, the recognition in *LTV* of a purported exception for "remedial advice"¹³⁹ is without precedent and clearly erroneous on the facts of that case. To the extent the "remedial" exception was meant to be coextensive with an exception for "post-event" or "work product" communications, it was superfluous and derived no support at all from *Garner*. In point of fact, numerous documents to which the *LTV* court denied access as "remedial" fell squarely within the period of alleged wrongdoing as defined by the class period of the suit.¹⁴⁰ Since the "remedial" advice in *LTV* was given *during* the class period, such advice would appear to have been central to proof of defendants' good faith or scienter, and it appears difficult to sanction denial of access to such advice on any grounds.

Under *Garner's* own terms, the only plausible basis for restriction of discovery in cases such as *Panter*, *LTV*, and *Ohio-Sealy* is in instances where the communications related to the litigation itself, i.e., constitute work product.¹⁴¹ Recognition of even this "exception" is unnecessary and not dispositive of any *Garner* question, since *Garner* made clear that documents consisting of advice pertaining to the litigation itself were only one indicium of "good cause."¹⁴² However, it would be far preferable for the courts to self-consciously examine a narrowly-defined category of work product, subject to an independent "good cause" test, than to recognize an expansive work-product exception to *Garner* principles.

The dictum in *International Systems* that *Garner* is "inapplicable" to work product is at best overbroad.¹⁴³ The suggestion in *International*

¹³⁹ 89 F.R.D. at 607-08.

¹⁴⁰ Additionally, the court admitted that the deciding factor in sustaining the privilege was the fact that the information was available elsewhere, not that it was remedial. *Id.* at 608.

¹⁴¹ Indeed, in *Wolfson*, the court tentatively ruled that defendants should produce all attorney-client communications except documents claimed to constitute work product pertaining to the litigation itself, and that the latter should be submitted to the court for in camera inspection. This ruling was never, however, embodied in an order, and the case was settled before any documents were produced or any formal order was entered with respect to the motion by which the documents were sought.

¹⁴² 430 F.2d at 1104.

¹⁴³ 693 F.2d at 1239; see *supra* note 101 and accompanying text. Of course, the fact that one court has held that the work-product doctrine "applies to work produced in anticipation of other litigation," is irrelevant to the discoverability of work product from other litigation under the *Garner* doctrine. *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). *Leggett & Platt* was not a shareholder suit, and the logic of *Garner* makes clear that work product antedating the suit at hand may be relevant and discoverable and is not sacrosanct in shareholder litigation. Furthermore, the federal courts are substantially divided as to the threshold question of whether the work-product doctrine does extend as broadly as *Leggett & Platt* suggests. See also authorities cited

Systems that any and all "work product documents could somehow be exempted from discovery under *Garner* seems clearly erroneous. Such error may result from the variety of work-product materials potentially at issue and from a failure to distinguish among them.

First, there are files having nothing to do with pending or imminent litigation which are prepared by corporate attorneys but never shared with corporate managers and which constitute "work product" only in the loosest sense. Second, there are similar files which are in fact disseminated to corporate managers. Third, there is true "work product" prepared in anticipation of litigation by corporate attorneys who render advice with respect to, or are otherwise involved in, transactions which later become the subject of litigation. Fourth, there is the true work product of attorneys—"legal hens," as Judge Higginbotham would have it—specially retained to represent corporate management in shareholder litigation once such litigation becomes unmistakably imminent.

The rationale underlying *Garner* leads inevitably to the conclusion that the test for the discovery of all relevant "work product" is whether there is "good cause" for its production. It is logically inconsistent to deny discovery of any documents denominated as "work product" which long antedate the suit at hand, for such documents confirm the anticipation of securities fraud or derivative litigation far prior to suit and presumptively contain strong evidence of a company's scienter with respect to alleged violations of the securities laws.

Moreover, there are good reasons for allowing discovery in many of the categories of "work product" enumerated above. The first and second categories of work product obviously do not even qualify as "work product" for purposes of the federal discovery rules, as they do not involve materials prepared in anticipation of litigation.¹⁴⁴ The third category involves communications between principals to an alleged fraud or participants in acts of mismanagement. These communications are so likely to yield highly probative evidence concerning the mens rea of the defendants to a suit that it is illogical to place them beyond the reach of a *Garner* motion. If corporate management chooses to retain an attorney involved in alleged wrongdoing to defend claims based on that wrongdoing, it should be prepared to have his "work product" disclosed to the corporation's shareholders; otherwise, his "work product" could be used to shield facts within his personal knowledge and to obscure his communications with fellow wrongdoers (or, if he is a defendant, with his co-defendants) after litigation has commenced. Such communications will ordinarily be so relevant and so probative with respect to the state of mind of defendants that it would be unfair to cloak them in secrecy.

Even the fourth category of work product should, in many instances, be

in 542 F.2d at 659-60.

¹⁴⁴ See FED. R. CIV. P. 26(b)(3).

discoverable. After all, it consists of nothing more than advice concerning the litigation itself, and *Garner* itself makes clear that the fact that documents relate to the litigation at hand is only one indicator that good cause might not exist. Further, *Garner* states that other factors, including factors not specifically enumerated in the nine-part *Garner* formulation, might prove overriding.¹⁴⁵

Whether or not the interests of shareholders and corporate management diverge by the time shareholders' suits become imminent, it is clear that it is the shareholders who pay for counsel which corporate management hires to defend itself. Thus, any oversimplistic notion that "work product" is nondiscoverable under *Garner* should be soundly rejected. At the very least, in complex cases where proof of scienter is elusive, counsel for shareholder-plaintiffs should be entitled to obtain work product materials under *Garner* when these methods constitute a unique source of evidence with respect to corporate scienter. Although an all-inclusive enumeration will not be attempted here, "good cause" for the production of work product would clearly exist at least when key witnesses are unavailable or have not been produced for deposition; where there is indication of the destruction or withholding of relevant evidence or of an abuse of the discovery process by the defendants; or where a corporation has undertaken its own "investigation" of alleged wrongdoing but has withheld the results. As to the latter situation, there is obviously "good cause" for streamlining the litigation process by providing plaintiffs with the results of such investigation. If indeed the corporate "investigators" have found wrongdoing, there is no reason for permitting evidence to be withheld from corporate shareholders. On the other hand, if corporate managers have been vindicated in an in-house investigation, it would appear a serious waste of corporate resources to withhold such probative evidence from shareholders' attorneys.

If the work product "exceptions" to *Garner* are permitted to flourish and the dictum of *International Systems* remains uncorrected, litigation of *Garner* issues will frequently be tortuous and protracted. Each time a document can reasonably be denominated a work product and each time one postdates the main actions complained of, the salutary principles of *Garner* can be temporarily or completely frustrated. At the very least, the litigation of *Garner* issues will be substantially prolonged and justice will be delayed in the interim. If a work product "exception" to *Garner* is to be recognized, courts must be careful to confine it narrowly to the work product documents relating to the litigation itself. This restriction will serve all the policy purposes which apparently underlie the post-*Panter* cases, while substantially limiting the opportunities for mischief otherwise available to inventive defense counsel.

¹⁴⁵ 430 F.2d at 1104.

IV. THE DISCOVERABILITY OF WORK PRODUCT AFTER INTERNATIONAL SYSTEMS

Even if an exception to *Garner* is recognized for work product documents pertaining to the litigation itself, and even if the nature of the documents in question is such that a satisfactory showing of "good cause" for their production cannot be made, discovery of such documents will frequently be appropriate.

A. *Establishing and Overcoming the Work-Product Immunity*

To begin with, the establishment of a proper work-product claim will not be a simple matter. As the Seventh Circuit recently reasoned in *Banks Manufacturing Co. v. National Presto Industry*,¹⁴⁶ "[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege; the privilege is not that broad."¹⁴⁷ The court explained that it agreed with those courts holding that an investigation prepared in the ordinary course of business, not for the purpose of aiding in future litigation, is discoverable.¹⁴⁸ Moreover, even where a legitimate work-product claim is presented, plaintiffs will be entitled to establish, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, that they have "substantial need" of the documents in question and that the equivalent cannot be obtained without "undue hardship."¹⁴⁹ The burden of satisfying these criteria should not be great. While the court in *International Systems* stated that "the cost of one or a few depositions is not [ordinarily] sufficient to justify discovery of work product [materials],"¹⁵⁰ it approvingly cited *Allen v. Denver-Chicago Trucking Co.*,¹⁵¹ as a case in which almost trivial expense was held to constitute undue hardship.¹⁵² In *Allen*, the court in fact ordered discovery of work-product materials simply because one witness was a resident of California and could be deposed

¹⁴⁶ 709 F.2d 1109 (7th Cir. 1983).

¹⁴⁷ *Id.* at 1118.

¹⁴⁸ *Id.* at 1118-19. *E.g.*, *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982) ("The mere contingency that litigation may result is not determinative"); see *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980); *Diversified Ind. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977).

¹⁴⁹ See *supra* note 67 and accompanying text. In addition, plaintiffs will be entitled to seek access to the work product under the crime-fraud exception, pursuant to which they must establish only a specific fraudulent intent by management in development of the work-product materials at issue. One way to establish such intent would be to "show discrepancies between what [corporate] investigators were told and the ultimate facts." *International Systems*, 693 F.2d at 1243 n.13.

¹⁵⁰ 693 F.2d at 1241.

¹⁵¹ 32 F.R.D. 616, 617 (W.D. Mo. 1963).

¹⁵² 693 F.2d at 1241.

only with "difficulty and unnecessary expense."¹⁵³ In the ordinary shareholder suit, it should be simple to establish far greater expense and burden.¹⁵⁴

B. Waiver Questions

Of course, there will be numerous instances where such documents, whether categorized as subject to the attorney-client privilege or work-product doctrine, will be available under a theory of waiver.

1. Waiver and the Special Litigation Committee

The clearest waiver situation will arise where an investigative report that might otherwise be considered "work product" is prepared by a special litigation committee¹⁵⁵ and its counsel in derivative litigation, pursuant to the procedures sanctioned in *Zapata Corp. v. Maldonado*.¹⁵⁶ It has been held that the utilization of an investigative report for the purposes of asking a court to dismiss the litigation waives any privilege, not only as to the report itself but also as to any documents reviewed or utilized by the committee.¹⁵⁷

¹⁵³ 32 F.R.D. at 618.

¹⁵⁴ Nonetheless, in *Heist v. Jacob*, No. C-3-82-184, slip. op. at 10 (S.D. Ohio Oct. 21, 1983), the court at the outset of discovery rejected the argument that the substantial need/undue hardship test was satisfied even though it was conceded that the requested discovery would require numerous depositions, at a cost of about \$5,000 each, to replicate. The court noted, in so concluding, that the case before it potentially involved millions of dollars in damages. However, the court made clear that its ruling was provisional and could be reconsidered during discovery in the light of new or changed facts.

¹⁵⁵ See *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. Super. Ct. 1981). A special litigation committee consists of "independent" directors ostensibly chartered to investigate the merits of derivative litigation and to determine whether prosecution of such litigation is in the corporation's "best interests." Needless to say, this curious creature of the law has been viewed suspiciously, not only by partisan shareholder-plaintiffs' lawyers, but by such distinguished and impartial bodies as the American Law Institute. The Institute has sought to place reasonable strictures on the operation of these committees and their ability to dismiss a shareholder suit prior to discovery and trial in the adversarial setting which is at the heart of our legal system. See *Principles of Corporate Governance and Structure: Restatement and Recommendations*, Tentative Draft No. 1 (April 1, 1982). It should hardly be surprising that the ALI's proposal for reform of the special litigation committee process has been subject to vigorous attack by the litigation section of the American Bar Association, in view of the fact that the section delegated consideration of the ALI proposal to a group consisting almost exclusively of in-house corporate counsel and prominent defense counsel. See *Section of Litigation's Comments to the American Law Institute Project on "Principles of Corporate Governance and Structure: Restatement and Recommendations, Tentative Draft No. 1"* (January 28, 1983).

¹⁵⁶ 430 A.2d 779 (Del. Super. Ct. 1981).

¹⁵⁷ See, e.g., *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 1498 (1983). It appears doubtful that the attorney-client privilege could ever properly attach to a special report after *Joy*, since few if any of the interviews or investigations underlying such reports can, in the wake of that case, be made with any plausible expectation

2. Waiver by Press Release

If an investigative report is not invoked to dismiss a suit but its conclusions are made public by a press release or otherwise, any arguable privilege could likewise be waived. As the Court of Appeals for the District of Columbia aptly stated in *Permian Corp. v. United States*:¹⁵⁸

The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.¹⁵⁹

The same principles of waiver hold true even if a special report and related documents can be characterized as "work product."¹⁶⁰ Disclosure of a "confidential" communication to third parties waives the work-product immunity where it substantially increases the opportunities for potential adversaries to obtain the information.¹⁶¹

3. Waiver by Disclosure to the Securities and Exchange Commission

Waiver of any privilege will also result from non-coerced disclosures to the SEC. In *Permian Corp.*, after disclosing allegedly "privileged" documents to the SEC, Occidental Petroleum Corporation sought to block dissemination of those materials to the Department of Energy. That attempt was rebuffed, with the court noting, in the quotation set forth above, that a client may not pick and choose between his opponents, waiving his privileges as to some and yet resurrecting a claim of confidentiality as to others.

Subsequently, in *In re Sealed Case*,¹⁶² a nameless company participating in a voluntary disclosure program of the SEC engaged a law firm to investigate questionable corporate payments. The company provided a copy of the final report, the firm's investigative notes, and other relevant documents to the SEC. Nonetheless, the company subsequently sought to

of confidentiality, such as is required as a predicate of the privilege. See *infra* text accompanying note 16.

¹⁵⁸ 665 F.2d 1214 (D.C. Cir. 1981) (citations omitted).

¹⁵⁹ *Id.* at 1221.

¹⁶⁰ However, in *Heist v. Jacob*, No. C-3-82-184, slip op. at 5, the court declined to find a waiver of the work-product immunity where it found that the company did not release a significant part of the special report, or summarize evidentiary matters in the report, but merely released the findings of the committee.

¹⁶¹ The law is clear that the work-product immunity is waived wherever an action substantially increases the opportunities for potential adversaries to obtain the information. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2024, 209-10 (1970). It is also waived where it is inconsistent with the client's desire to keep the documents "out of its adversary's hands." *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981).

¹⁶² 676 F.2d 793 (D.C. Cir. 1982).

quash a grand-jury subpoena for the very same documents, invoking the attorney-client and work-product privileges. While noting that the government had not made the showing that would normally be required to overcome the work-product privilege, the court found that no work-product claim was preserved when documents had been provided to the SEC. The same result recently prevailed in *In re Subpoena Duces Tecum to Fulbright & Jaworski and Vinson & Elkins*.¹⁶³ Indeed, the latter appears to constitute the first case specifically allowing plaintiffs in private actions to receive documents shared with the SEC under its voluntary disclosure program.¹⁶⁴

Familiar principles prohibiting selective disclosures¹⁶⁵ should of course be carefully applied where SEC disclosures are involved. It is unfortunately not unheard-of for a company to submit the "factual" portion of an investigative report to the SEC while withholding its "legal" analysis on the basis of claims of work-product immunity. Sanctioning this type of procedure can work remarkable mischief, since it may lead to bifurcated reports with cryptic or sanitized facts at odds with the tenor of the subsequent legal analysis, which is never seen by the SEC. Receipt of half of a lawyer's work product could thus mislead the SEC and create the very injustice that the prohibition upon selective disclosures was designed to abolish.

4. Disclosures to Third Parties

Waiver may also occur by disclosures to third parties. For example, in *In re John Doe Corp.*,¹⁶⁶ disclosure of a "Business Ethics Review" report to the company's auditors in connection with their year-end audit, and a conversation between corporate general counsel and the accountant with respect to the matters under review, were held to waive the privilege. The court's eminently sound rationale was that the disclosure was not made to the accountant to seek legal advice but rather to resolve audit issues and

¹⁶³ [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,505 (D.D.C. Sept. 23, 1983).

¹⁶⁴ Prior to the above-cited recent developments in the District of Columbia Circuit, some courts had held that voluntary cooperation with the SEC did not amount to a waiver on the grounds that such a finding might "chill" voluntary cooperation with the SEC and that such cooperation should be encouraged. See, e.g., *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc); *Byrnes v. IDS Realty Trust Co.*, 85 F.R.D. 679 (S.D.N.Y. 1980). That approach, even prior to *Permian and Sealed Case*, was rejected as overbroad. In *Teachers Ins. & Annuity Ass'n v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981), for example, the court took the middle position that waiver would be found if documents were produced to the SEC without reservation, while no waiver would be found where they were produced subject to a specific claim of privilege.

¹⁶⁵ The courts have recognized that a defendant is not free to disclose only those portions of a "privileged" communication that it finds advantageous, lest a privilege become a shield for deception and injustice. See, e.g., *R.J. Herely & Son Co. v. Stotler & Co.*, 87 F.R.D. 358 (N.D. Ill. 1980); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972).

¹⁶⁶ 675 F.2d 482 (2d Cir. 1982).

that once a corporate decision is made to disclose confidential matter even for a commercial purpose, the privilege is nonetheless lost.¹⁶⁷

5. Miscellaneous Waivers

Of course, waiver of the attorney-client and work-product privileges will also occur in numerous other circumstances: for example, where objections to interrogatories seeking information ostensibly covered by those privileges are not timely made;¹⁶⁸ where the materials are used to prepare a witness for deposition and "refresh" his recollection;¹⁶⁹ where the purported "confidentiality" of the materials is not even maintained within the corporation;¹⁷⁰ or where privileged documents have already been produced.¹⁷¹

IV. CONCLUSION

Despite the normal sanctity of the attorney-client privilege and work-product immunity, there is precious little place for their application in bona fide securities litigation, in which fraud or waste is alleged by the owners of a corporation and the communications of lawyers ultimately paid for by shareholders are of utmost relevance to the state of mind and activities of corporate managers. The *Garner* doctrine, which remains of unquestionable vitality, makes clear that the only plausible limitation on the discoverability of relevant communications is bona fide work product prepared in anticipation of the litigation by lawyers who were not themselves involved in the claimed fraud or waste. As *Garner* noted, in all cases the discoverability of communications is subject to an overriding test of good cause. Further, even the "work product" exception will not insulate from review documents for which plaintiffs have substantial need and which they cannot obtain without undue hardship. Finally, the doc-

¹⁶⁷ *Accord* United States v. Brown, 478 F.2d 1038 (7th Cir. 1973); United States v. Cote, 456 F.2d 142 (8th Cir. 1972); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

¹⁶⁸ *See, e.g.,* Fonseca v. Regan, 98 F.R.D. 694, 701 (E.D.N.Y. 1983); Davis v. Romney, 53 F.R.D. 247, 248 (E.D. Pa. 1971), Antico v. Honda of Camden, 85 F.R.D. 34, 35-36 (E.D. Pa. 1979).

¹⁶⁹ *See, e.g.,* James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977); Fed. R. Evid. 612.

¹⁷⁰ *See, e.g.,* *In re* Horowitz, 482 F.2d 72, 81-82 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973) ("[I]t is vital to a claim of privilege that the communications between client and attorney . . . have been maintained in confidence"); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954). *But see*, James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982).

¹⁷¹ *See, e.g.,* *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979). In cases involving accelerated discovery, findings of waiver are less likely, since the courts are reluctant to find a waiver by inadvertent disclosure where there is a truly substantial excuse for the disclosure. *See* Transamerica Computer Co. v. International Business Mach. Corp., 573 F.2d 646 (9th Cir. 1978).

trine of waiver will preclude objections to discovery of either attorney-client or work-product communications where use is made of them by the corporation and where surrounding them with a mystical veil of secrecy would be unfair and anomalous.

